

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of )  
MAKENA WASTEWATER CORP. )

DOCKET NO. 2007-0073

For a Declaratory Ruling Regarding )  
Hawaii Revised Statutes Chapter 269 )  
Regarding Approval of Proposed )  
Transaction. )  
\_\_\_\_\_ )

DECISION AND ORDER NO. 23408

Filed May 2, 2007  
At 2 o'clock P.M.

Karen Higashi  
Chief Clerk of the Commission

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Commission, State of Hawaii.

Karen Higashi

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Docket No. 2007-0073  
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DECISION AND ORDER

By this Decision and Order, the commission denies Petitioner MAKENA WASTEWATER CORP.'s ("MWC") requests for a declaratory ruling that: (1) the sale of one-hundred percent (100%) of its outstanding common stock by its parent entity does not require the commission's approval under HRS chapter 269; and (2) the commission not assert its jurisdiction to review and approve the subject transaction.<sup>1</sup>

I.

Background

A.

Description of the Subject Entities  
and the Stock Purchase Agreement

MWC is a public utility authorized to provide wastewater treatment services within a portion of a master-

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<sup>1</sup>The Parties in this declaratory action are MWC and the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate"), an ex officio party, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

planned real estate development project in the Makena area on the island of Maui.<sup>2</sup> The land and improvements which comprise the master-planned real estate development project ("Project Lands") are held by Maui Prince Hotel, LLC ("MPH"), a Hawaii limited liability company, and Lokelani Resort Corp. ("LRC"), a Hawaii corporation. MPH and LRC are related entities to MWC. MWC's sole shareholder, in turn, is Moani Corp. ("Moani"), a Hawaii corporation.

Meheu, LLC ("Meheu") is a Delaware limited liability company, and a related entity to Honua, LLC ("Honua").

Pursuant to a Stock Purchase Agreement, dated January 25, 2007, Moani, MWC's parent entity, agrees to sell one-hundred percent (100%) of MWC's outstanding stock to Meheu for \$500,000.

The closing of the subject transaction is conditioned in part on either: (1) the issuance of a final declaratory order confirming that the commission's approval is not required for the consummation of the subject transaction; or (2) if the commission determines that its approval is required, then a final order approving the subject transaction.<sup>3</sup>

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<sup>2</sup>See In re Makena Wastewater Corp., Docket No. 02-0133, Decision and Order No. 21352, filed on September 16, 2004 (issuance of a certificate of public convenience and necessity to MWC).

<sup>3</sup>MWC explains that, in an abundance of caution, it intends to file a separate application jointly with Meheu, seeking the commission's approval of the subject transaction.

B.

MWC's Petition

By its petition, filed on March 20, 2007, MWC requests a declaratory ruling that the sale of one-hundred percent (100%) of MWC's outstanding common stock by its parent entity, Moani, to Meheu, pursuant to the Stock Purchase Agreement, dated January 25, 2007, does not require the commission's approval under HRS chapter 269.<sup>4</sup> Specifically, MWC seeks a declaratory ruling that HRS §§ 269-7, 269-17, 269-18, and 269-19 do not apply to the subject transaction, and that the subject transaction is exempt from HRS § 269-17.5. MWC also requests that, in this instance, the commission not assert its jurisdiction to review the subject transaction under HRS § 269-7.<sup>5</sup>

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<sup>4</sup>MWC's Petition for Declaratory Ruling; Verification; Exhibits A to D; and Certificate of Service, filed on March 20, 2007 (collectively, "Petition"). MWC served copies of its Petition upon the Consumer Advocate.

HAR chapter 6-61, subchapter 16, governs declaratory orders issued by the commission. In general, HAR § 6-61-162(a) provides that within forty-five days after the submission of a declaratory ruling, the commission shall deny the petition, issue a declaratory order on the matters contained in the petition, or set the matter for a hearing. The deadline for commission action on MWC's petition for declaratory relief is on or about May 4, 2007. Accordingly, for this reason, the commission, on April 11, 2007, instructed the Consumer Advocate to file its position statement by April 23, 2007, stating whether it intends to participate in this proceeding, and if so, its position on the relief requested. See Order No. 23352, filed on April 11, 2007.

<sup>5</sup>On April 12, 2007, the Consumer Advocate informed the commission that it intended to participate in this proceeding, that it would be unable to file a statement of position by April 23, 2007, and that instead it would file a statement of position by April 27, 2007. See Consumer Advocate's letter, dated April 12, 2007. The Consumer Advocate filed its Statement of Position on April 25, 2007. The Consumer Advocate did not request an extension of time to file a statement of position, as it may have under the commission's rules. See HAR

C.

MWC's Position

MWC explains that:

1. Its wastewater treatment facilities were constructed specifically to serve the Project Lands owned and being developed by MWC's affiliated entities, MPH and LRC.

2. The subject transaction is related to a larger transaction involving the sale of the Project Lands by MPH and LRC to Honua.

3. Meheu is the Honua-related entity that is seeking to own MWC's stock, in order to continue to serve the Project Lands for wastewater utility purposes.

In support of its Petition, MWC asserts:

1. Because the subject transaction does not involve MWC issuing any stock or debt, HRS § 269-17 does not apply to the subject transaction.

2. Meheu, the proposed purchaser, is not a public utility regulated by the commission. As such, HRS § 269-18 does not apply to the subject transaction.

3. The subject transaction does not involve a merger or consolidation, sale disposition, or encumbrance of public utility property. As such, HRS § 269-19 does not apply.

4. The subject transaction is an exempt transaction under HRS § 269-17.5(c)(2), and is not subject to the commission's approval under HRS § 269-17.5.

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§ 6-61-23(a)(1). Thus, the Consumer Advocate's Statement of Position is untimely and will not be considered in this matter.

5. While MWC readily acknowledges that the commission has previously asserted its jurisdiction to review and approve utility-related transactions pursuant to its general investigative powers under HRS § 269-7, MWC requests a ruling from the commission that it will not assert its jurisdiction to review and approve the subject transaction, given the facts and circumstances of this case. In this regard:

MWC submits that Commission oversight will be unnecessary, in view of the larger, related transaction involving the sale of the Project Lands, the same, symbiotic relationship will exist between MWC and the new owners of the Project Lands - both of whom will be related entities. Moreover the [Stock Purchase] Agreement confirms that MWC's new owner has already specifically acknowledged that MWC: "is a 'public utility' as defined under Haw. Rev. Stat. Chapter 269, and shall therefore continue to operate under its PUC-approved rates and tariff, and shall continue to be regulated by the PUC, and subject to all applicable public utility laws and PUC rules, decisions, and policies governing public utilities in the State of Hawaii." Agreement at § 7.

MWC's Petition, at 10.

## II.

### Discussion

The commission proceeds with its discussion, below, of each statutory provision cited by MWC.

#### A.

#### HRS § 269-17

HRS § 269-17 provides that, upon the commission's prior approval, a public utility corporation may issue stocks and stock certificates, bonds, notes, and other evidences of indebtedness,

payable at periods of more than twelve (12) months after the date thereof, for the following purposes, and no other:

for the acquisition of property or for the construction, completion, extension, or improvement of or addition to its facilities or service, or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income or from any other moneys in its treasury not secured by or obtained from the issue of its stocks or stock certificates, or bonds, notes, or other evidences of indebtedness, for any of the aforesaid purposes except maintenance of service, replacements, and substitutions not constituting capital expenditure in cases where the corporation has kept its accounts for such expenditures in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which the expenditures were made, and the sources of the funds in its treasury applied to the expenditures.

HRS § 269-17.

Conversely, "[a] public utility corporation may not issue securities to acquire property or to construct, complete, extend or improve or add to its facilities or service if the commission determines that the proposed purpose will have a material adverse effect on its public utility operations."

HRS § 269-17. "All stock and every stock certificate, and every bond, note, or other evidence of indebtedness of a public utility corporation not payable within twelve months, issued without an order of the commission authorizing the same, then in effect, shall be void." Id.

Here, the subject transaction does not involve the issuance of any stock or other evidences of indebtedness by MWC, a public utility. Accordingly, the commission concludes and declares that HRS § 269-17 is inapplicable to the subject transaction.

B.

HRS § 269-18

HRS § 269-18 states:

**Acquirement of stock of another public utility.** No public utility corporation shall purchase or acquire, take or hold, any part of the capital stock of any other public utility corporation, organized or existing under or by virtue of the laws of the State, without having been first authorized to do so by the order of the public utilities commission. Every assignment, transfer, contract, or agreement for assignment or transfer of any stock by or through any person or corporation to any corporation or otherwise in violation of this section shall be void and of no effect; and no such transfer shall be made on the books of any public utility. Nothing herein shall be construed to make illegal the holding of stock lawfully acquired before July 1, 1933.

HRS § 269-18.

HRS § 269-18 prohibits a public utility from purchasing or acquiring any part of the capital stock of any other public utility organized or existing under Hawaii law. Here, Meheu, the proposed purchaser of MWC, is not a public utility as defined by HRS § 269-1. Hence, the commission concludes and declares that HRS § 269-18 is inapplicable to the subject transaction.

C.

HRS § 269-19

HRS § 269-19 provides that no public utility shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its road, line, plant, system, or other property necessary or useful in the performance of its duties to the public, nor by any means, directly or indirectly, merge or consolidate with any other public utility, without first



having secured from the commission "an order authorizing it so to do. Every such sale, lease, assignment . . . [or] disposition . . . made other than in accordance with the order of the commission shall be void." The purpose of HRS § 269-19 is to safeguard the public interest. In re Honolulu Rapid Transit Co., Ltd., 54 Haw. 402, 409, 507 P.2d 755, 759 (1973).

Here, the subject transaction does not appear to involve the sale, leasing, assigning, mortgaging, or encumbrance of a utility's property necessary or useful in the performance of its duties to the public, nor does it appear to involve the direct or indirect merger or consolidation by MWC with any other public utility. Rather, pursuant to the Stock Purchase Agreement, MWC's parent entity, Moani, agrees to sell all of MWC's outstanding stock to Meheu. Accordingly, the commission concludes and declares that HRS § 269-19 does not apply to the subject transaction.

D.

HRS § 269-17.5

HRS § 269-17.5 states:

**Issuance of voting stock; restrictions.**

(a) For purposes of this section "foreign corporation" means a foreign corporation as defined in section 235-1 or a corporation in which a majority of the voting stock is held by a single foreign corporation as defined in section 235-1.

(b) "Nonresident alien" means a person not a citizen of the United States who is not defined as a resident alien by the United States Citizenship and Immigration Services.

(c) No more than twenty-five per cent of the issued and outstanding voting stock of a corporation organized under the laws of the State

and who owns, controls, operates, or manages any plant or equipment, or any part thereof, as a public utility within the definition set forth in section 269-1 shall be held, whether directly or indirectly, by any single foreign corporation or any single nonresident alien, or held by any person, unless prior written approval is obtained from the public utilities commission, or unless a transaction is exempt. An exempt transaction is:

- (1) Any purchase or sale by an underwriter;  
or
- (2) A transaction to acquire shares of a corporation with less than one hundred shareholders and less than \$1,000,000 in assets.

Every assignment, transfer, contract, or agreement for assignment or transfer of any shares in violation of this section shall be void and of no effect; and no such transfer shall be made on the books of the corporation. Nothing herein shall be construed to make illegal the holding of stock lawfully held, directly or indirectly, prior to June 4, 1977.

HRS § 269-17.5 (emphasis added).

While MWC acknowledges that Meheu, as a Delaware limited liability company, is a foreign corporation under HRS § 269-17.5, MWC represents that it has less than one hundred shareholders and possesses assets of less than \$1 million.<sup>6</sup> In particular, MWC states that it has a single shareholder, Moani, and it confirms that since the filing of its 2005 Annual Financial Report with the commission,<sup>7</sup> MWC's assets have remained under \$1,000,000. Thus, MWC asserts that the subject transaction constitutes an exempt transaction pursuant to HRS § 269-17(c)(2).

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<sup>6</sup>MWC's Petition, at 7 - 9.

<sup>7</sup>MWC's Petition, Exhibit D, MWC's 2005 Annual Financial Report (\$608,532 in assets).

Based on MWC's pertinent representations, the commission concludes and declares that the subject transaction is an exempt transaction under HRS § 269-17(c)(2).

E.

HRS § 269-7

HRS § 269-7(a) authorizes the commission to examine the condition of each public utility, its financial transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations."

In In re Ionex Telecomm., Inc., Telecom Resources, Inc., and Advanced Comm. Group, Inc., Docket No. 99-0223, the commission held that it had the jurisdiction to review the sale and transfer of all of a telecommunications carrier's outstanding stock by its parent entity to a unrelated entity "and all similar transactions under HRS § 269-7."<sup>8</sup> More recently, in In re Hawaii-American Water Co., Docket No. 2006-0095, the commission held that the sale of all the common stock of a wastewater utility's parent company, through one or more public offerings, was subject to the commission's review and approval under HRS § 269-7(a).<sup>9</sup>

Accordingly, the commission will only approve the sale and transfer of a public utility's stock if it is reasonable and

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<sup>8</sup>In re Ionex Telecomm., Inc., Telecom Resources, Inc., and Advanced Comm. Group, Inc., Docket No. 99-0223, Decision and Order No. 17369, filed on November 8, 1999, at 4.

<sup>9</sup>In re Hawaii-American Water Co., Docket No. 2006-0095, Decision and Order No. 22511, filed on June 5, 2006.

consistent with the public interest, and such transaction is reasonable and in the public interest if it will not adversely affect the public utility's fitness, willingness, and ability to provide the utility's regulated services, as authorized by its certificate of public convenience and necessity.<sup>10</sup> The commission, thus, concludes and declares that: (1) the subject transaction is subject to the commission's review and approval under HRS § 269-7(a); and (2) the commission declines MWC's request to refrain from asserting its jurisdiction under HRS § 269-7(a).

### III.

#### Summary of Findings and Conclusions

The commission's findings and conclusions are summarized as follows:

1. HRS §§ 269-17, 269-18, and 269-19 do not apply to the subject transaction, under the facts and circumstances of this case, as long as the facts presented and representations made to the commission in this docket remain true and accurate.

2. The subject transaction is an exempt transaction under HRS § 269-17(c)(2), under the facts and circumstances of this case, as long as the facts presented and representations made to the commission in this docket remain true and accurate.

3. The subject transaction, under the facts and circumstances of this case, is subject to the commission's review and approval under HRS § 269-7(a). Such regulatory authority will be exercised by the commission with respect to the subject

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<sup>10</sup>See Decision and Order No. 17369, at 4.

transaction, in the separate joint application filed or to be filed by MWC.

#### IV.

##### Orders

##### THE COMMISSION ORDERS AND DECLARES:

1. MWC's request for a declaratory ruling that the subject transaction does not require the commission's approval under HRS chapter 269 is denied.

2. HRS §§ 269-17, 269-18, and 269-19 do not apply to the subject transaction, under the facts and circumstances of this case, as long as the facts presented and representations made to the commission in this docket remain true and accurate.

3. The subject transaction is an exempt transaction under HRS § 269-17(c)(2), under the facts and circumstances of this case, as long as the facts presented and representations made to the commission in this docket remain true and accurate.

4. The subject transaction, under the facts and circumstances of this case, is subject to the commission's review and approval under HRS § 269-7(a).

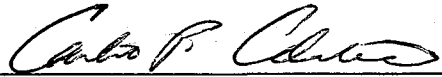
5. MWC's request that the commission not exercise its jurisdiction to review and approve the subject transaction under HRS § 269-7(a) is denied.

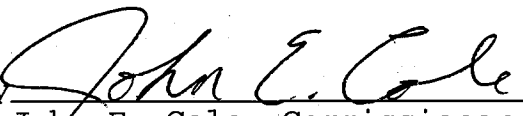
6. This docket is closed unless ordered otherwise by the commission.

DONE at Honolulu, Hawaii

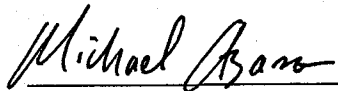
MAY - 2 2007

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By   
John E. Cole, Commissioner

APPROVED AS TO FORM:

  
Michael Azama  
Commission Counsel

2007-0073.eh

CERTIFICATE OF SERVICE

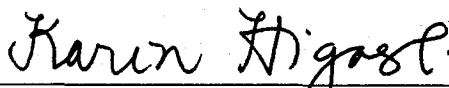
I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23408 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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Karen Higashi

DATED: MAY - 2 2007